No. 03-1693

Supreme Court, U.S.
FILED
DEC 8 - 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

McCREARY COUNTY, KENTUCKY; JIMMIE GREENE, as McCreary County Judge Executive; PULASKI COUNTY, KENTUCKY; DARRELL BESHEARS, as Pulaski County Judge Executive,

Petitioners,

v.

ACLU OF KENTUCKY, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF AMICUS CURIAE OF THE FAMILY RESEARCH COUNCIL, INC. AND FOCUS ON THE FAMILY IN SUPPORT OF THE PETITIONERS

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INTEREST OF THE AMICUS CURIAE[1]

Family Research Council, Inc. [hereinafter "FRC"] is a non-profit, research and educational organization dedicated to articulating and advancing a family-centered philosophy of public life. In addition to providing policy research and analysis for the legislative, executive, and judicial branches of the federal government, FRC seeks to inform the news media, the academic community, business leaders, and the general public about family issues that affect the nation.

FRC's legal and public policy experts are continually sought out by federal and state legislators for assistance and advice. FRC has participated in numerous amicus curiae briefs in the United States Supreme Court, lower federal courts, and state courts.

FRC represents thousands of constituents in its efforts to protect the institutions of marriage and family in federal and state law. Toward that end, FRC has worked to strengthen the legal definition of marriage as being a union of one man and one woman, as it always has been in the United States. FRC has conducted extensive research and produced numerous publications regarding the traditions of legal, cultural, moral, and religious support for marriage, as well as regarding the tangible benefits of traditional marriage for individuals and society.

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[1] The parties have consented to the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the Amicus Curiae, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

Focus on the Family [hereinafter "FOF"] is a non-profit communications and educational organization dedicated to the preservation of marriage, parenting, and the nurturing home. FOF produced a number of national and international radio broadcasts on family and cultural issues, publishes a number of magazines for family members of various ages and stages and a wider range of books as well as a website: family.org.

Millions of families in America and abroad rely on FOF for help in understanding the dynamics of their own family as well as what is happening with the family culturally and how they help strengthen both.

SUMMARY OF ARGUMENT

The Sixth Circuit's analysis of both the displays and the pertinent law was grievously mistaken. Contrary to what that court held, many Supreme Court precedents confirm what historians of America have long maintained: our constitutional and legal traditions cannot be accurately understood without recognizing their roots in a theistic worldview. But not just any theistic tradition; as this Court has said repeatedly, our beliefs in human rights and limited government, along with other fundamental convictions, have deep roots in the ethical monotheism of the Bible. The Ten Commandments are the central expression of this worldview.

The document displays challenged below recognize what this Court's cases have long taught. The displays fairly and impartially indicate that biblical ethical monotheism underlies American constitutional and legal traditions. The displays studiously avoid advancing, endorsing,

or otherwise vouching for the Bible as truly being the Word of God, or the religions based upon it. The displays therefore comport with all this Court's relevant precedents, as they were articulated most perspicaciously by Justice Powell in the case of *Edwards v. Aguillard*, 482 U.S. 578, 606-07 (1987) (Powell, J., concurring).

ARGUMENT

I. The Sixth Circuit Misunderstood the Message of the Documents on Display, Which Is That Biblical Ethical Monotheism Undergirds Our Basic Rights and Form of Government.

Applying what it believed to be the *Lemon* test, the Sixth Circuit held that the Kentucky displays had two constitutional defects: a "predominantly" religious purpose and the effect of "endorsing" religion. Both defects depended upon the court's conclusion that the Decalogue's "connection" to the other documents was not "demonstrated." Thus, the Sixth Circuit found no "secular" purpose because the Ten Commandments "lack[ed] a demonstrated analytical or historical connection with the other documents."[2] But the court did find an "endorsement" of religion because of "the complete lack of any analytical connection" between the Decalogue and the other displayed texts.[3] A "reasonable observer cannot connect them," concluded the Sixth Circuit.[4]

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[2] ACLU of Kentucky v. McCreary County, 354 F.3d 438, 451 (6th Cir. 2003).

[3] *Id.* at 460.

[4] *Id.*

The requisite "connection" is there. Unfortunately, the Sixth Circuit looked in the wrong place for the wrong sort of "connection." Unsurprisingly, it was disappointed. But a reasonable observer has no trouble seeing what the array of documents is about, and how the Ten Commandments fit right in.

A reasonable observer could be any member of this Court on a working day. The frieze in the Supreme Court chamber depicts eighteen individuals presented to the viewer as constituents of a class, as a multi-member unit or set. These figures – Hammurabi, Confucius, Justinian, Moses, Muhammad, and the rest – are a diverse lot, hailing from vastly different cultures and historical eras, possessed of different worldviews. What are they doing together in the frieze? What is the set-defining characteristic? They are all male, deceased, influential. But the reasonable viewer does not conclude that the frieze is simply about powerful dead men. At least three of the figures – Moses, Confucius, and Muhammad – are great religious figures. Most, however, are not. So the reasonable viewer does not take the set's defining characteristic to be religion. A reasonable observer who knows a little history sees before long that the frieze depicts a set of great human *Lawgivers*.

Consider now a reasonable observer of the Kentucky displays. Our observer sees eleven equal size frames containing a total of nine documents. All nine are presented in the same manner. None is held out to the eye as primary, special, separate. Any reasonable observer would conclude – as does anyone who views the Supreme Court frieze – that the individual specimens are members of a set.

What is *this* set's principle of unity? Many were produced by recognized political authority. But the Star Spangled Banner was not. Neither was the Decalogue. The Mayflower Compact and the Declaration of Independence were not, either: they are manifestos by people on the cusp of political organization. Some of the "political" documents are scarcely more than prayers – the Kentucky Constitution Preamble and the National Motto are two examples. Two (the Decalogue and the Magna Carta) are foreign imports. The Mayflower Compact has a foot on two shores, composed by English settlers anchored off the Massachusetts coast.

What do the individual members of *this* set have in common? Neither Lady Justice nor the Bill of Rights includes an explicit reference to God. All the others do, and the First Amendment refers to "religion." Both Lady Justice and the Bill of Rights make sense, moreover, in light of background convictions about equal human dignity, unconditional human rights, and limited government instituted *for* the people. These convictions suggest, if they do not imply, an objective moral order: rights do not depend upon power or prestige or upon some majority's (or powerful minority's) shifting view of what is advantageous to them. Human dignity and human rights have sources beyond the willing and wishes of people.

The God spoken of by the Kentucky documents is transcendent and intelligent, a greater-than-human source of meaning and value. The documents as a whole show that their human authors considered themselves dependent upon this God's continuing care. This care for humans according to a divine plan is most often called Providence, and the documents reflect heartfelt recognition of it. "In God We Trust." Many of the texts – the

Preamble, the Mayflower Compact, the first part of the Decalogue – make clear that humans owe God thanks, prayer, and homage.

A reasonable observer sees that the Kentucky displays contain a great deal of divergent detail, including much that is time- and place-bound, including complaints about particular temporal rulers, contingent political plans and the like. The reasonable observer's eye sees as well much that is grander, more exalted, even timeless. This observer's eye fixes upon the pervading common themes: God, and God's direction of and care for human persons. The documents are also pervaded by law, *nomos*, what is right to do, small and large: What is the morally sound way for government to treat people? How do people joined together in political community properly treat each other? What does justice require? How do we show respect for all humankind? What has God said to help us answer these important questions?

The reasonable observer sees that a unifying theme of the Kentucky display is the objective moral law as the effect or deliverance of God – ethical monotheism. The reasonable observer sees, too, that the documents evince a particular ethical monotheism, and its specific influence upon a particular nation: the United States of America. The reasonable observer concludes that the documents' unifying theme is that biblical ethical monotheism has shaped our basic law and our political tradition.[5]

[5] The Decalogue has a limited priority here, because it is the Bible's most concrete expression of ethical monotheism. It is nonetheless *illustrative* of that whole cultural and political worldview – biblical ethical monotheism – which shaped our tradition. To their credit, Defendants did not seek to highlight, or even to depict, this limited

(Continued on following page)

The Kentucky displays are really one frame of the Supreme Court frieze, brought into very sharp focus. They depict how *one* of the history's great Lawgivers – Moses – shaped *our* country, its laws and political institutions. And just in case, viewers of the courthouse displays read that it is about "Foundations of American Law and Government."[6]

This Court's testimony in favor of this theme is not limited to its own interior artwork. This Court more than fifty years ago stamped Madison's *Memorial and Remonstrance* as the Magna Carta of religious liberty in America. Appended in its entirety to *Everson v. Board of Education*,[7] and excerpted many times since by members of this Court, Madison's ode to freedom declares: "It can be truly said, therefore, that today, as in the beginning, our national life reflects a religious people who, in the words of Madison, are 'earnestly praying, as . . . in duty bound, that the Supreme Lawgiver of the Universe . . . guide them into every measure which may be worthy of his (blessing . . .)."[8]

This is the message of the Kentucky documents: the American people, a religious nation, acknowledge that their actions as a people are guided by the Supreme Lawgiver, and they – that is, *we* – give thanks.

priority, so as to avoid all the more certainly the possible appearance of taking sides in strictly religious matters.

[6] *Id.* at 451.

[7] 330 U.S. 1, 63-72 (1947) (appx. to Rutledge, J., dissenting).

[8] Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 213 (1963).

II. This Court's Precedents Sanction Governmental Displays Which Recognize the Dependence of Our Legal Institutions Upon Biblical Ethical Monotheism.

Many times since *Everson* was decided in 1947 has this Court affirmed Madison's central point. Just five years later, in *Zorach v. Clauson*, this Court gave unqualified approval to the proposition that "[w]e are a religious people whose institutions presupposes a Supreme Being."[9] This Court in *Schempp* later affirmed and elaborated upon this recognition, saying that the "fact that the Founding Fathers believed devotedly that there was a God and the unalienable rights of man were rooted in Him is *clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself.*"[10]

The Sixth Circuit mentioned this passage from *Schempp*, but then wholly ignored its meaning. The lower court was convinced that, because documents such as the Bill of Rights and the Declaration of Independence do not include explicit mention of the Decalogue, no connection is "facially apparent." The court then required that the (assertedly) missing "connection" be supplied by full prefatory explanation. *McCreary County*, 354 F.3d at 451. *Schempp* belies the Sixth Circuit's conviction: neither the Mayflower Compact nor the Constitution expressly *says* that human rights are inalienable, or that they depend on God. The *Schempp* Court nonetheless said that "their" – that is, the Founders' – writings "evidence" those convictions. The question which *Schempp* poses about this case

[9] 343 U.S. 306, 313 (1952).

[10] 374 U.S. at 213 (emphasis added).

is whether the Declaration of Independence "evidence[s]" beliefs about the divine ground of inalienable rights, not what the Declaration expressly recites.

Schempp referred to two of the documents on display in Kentucky – the Mayflower Compact and that part of the Constitution known as the Bill of Rights. But this was no exhaustive list. This Court listed those two documents instead as members of a huge set of writings: those "from the Mayflower Compact" – written in 1620 – "to the Constitution itself" – written from 1789 to 1791. In between those temporal poles lies the Declaration of Independence. In it our founders declared: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness."

The Sixth Circuit found no evidence of biblical ethical monotheism in this great manifesto of our freedom, notwithstanding the several references to God, God's Creation, God's law, and our inalienable rights. The court below conceded only a "facial similarity" between the Decalogue and Declaration: "they both recognize the existence of a deity." *Id.* But this concession is facially mistaken: the "deity" of the Declaration is no anonymous or generic Supreme Being way out there, bereft of Providential care for humans (as is the god of deism). The "deity" of the Declaration is precisely that biblical God of which the *Schempp* Court wrote. It is the "creator" God who "endowed" (that is, who supplied gratuitously) creatures "equal" in dignity with "unalienable rights," including "life, Liberty, and the pursuit of Happiness."

The Sixth Circuit said that the Decalogue "say[s] nothing about men being created equal." *Id.* The Ten Commandments do not, it is true, contain the literal expression, "all men are created equal." But here again the lower court failed to take seriously this Court's admonition in *Shempp*: look for the convictions about God and human rights which the Founders' writings – the Declaration of Independence in this case – *evidence.* In fact, no ground of human equality has been more central to its achievement in this country that the belief we find in the Bible that we are all brothers and sisters of the same God. A glance at nineteenth century abolitionist arguments, or at the writings of Martin Luther King, Jr., makes that clear to any reasonable observer.

The Ten Commandments supply additional evidence of human equality, and supply the ground for inalienable human rights, too. The moral duties of the Second Table of the Decalogue are objective; that is, they are categorical and universal. It is simply wrong for anyone to murder, steal, bear false witness. These duties logically entail a class of beneficiaries who are thereby vouchsafed unconditional ("inalienable") human rights. Everyone has a right not to be murdered, not to be lied to, not to be a victim of theft, no matter who would do the killing or stealing or lying, and no matter what reason they offer for doing it.

The Sixth Circuit missed the whole point of Jefferson's appeal to the "Laws of Nature and of Nature's God." The point was precisely that there is a higher moral law – and a Supreme Lawgiver – to which even the monarch of the world's most powerful country must bow. In case the earthly king refuses, God's creatures could justifiably resist oppression by appeal to that same transcendent morality.

In truth and as Lincoln suggested, the Declaration of Independence is the "frame" into which the Framers placed the United States Constitution. John Quincy Adams – cited by the Sixth Circuit as Jefferson's collaborator on the Declaration[11] – said that the Constitution "was the complement to the Declaration of Independence; founded upon the same principles, carrying them out into practical execution, and forming with it, one entire system of national government."[12] Adams also stated that "[t]he Declaration of Independence and the Constitution of the United States[] are parts of one consistent whole, founded upon one and the same theory of government."[13]

The Kentucky displays include our national Bill of Rights presumably because it is our country's highest political expression of the concepts found in the Declaration of Independence: government bound to respect the equal inalienable rights of human persons. The Mayflower Compact also manifests ethical monotheism which, for the Pilgrims, meant primarily the Ten Commandments. The Compact was written "In the name of God" and "in the presence of God." The colonists covenanted together to establish "a civil body politic for our better ordering and preservation." The Magna Carta expresses the idea that the rights of man are inalienable and are God-given. Blackstone describes the declaration of rights and liberties

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[11] *Id.* at 452 n.5.

[12] Daniel L. Driesbach, *In Search of a Christian Commonwealth: An Examination of the Selected Nineteenth-Century Commentaries on References to God and the Christian Religion in the United States Constitution*, 48 BAYLOR L. REV. 927, 970 (1996) (quoting John Quincy Adams, *The Jubilee of the Constitution, reprinted in* 6 J. CHRISTIAN JURISPRUDENCE 2, 5 (1986)).

[13] *Id.*

in the Magna Carta as conforming to the natural liberties of all individuals which were endowed by God at creation and are vested by the immutable law of nature. It is easy to see here, too, that the Ten Commandments help us to make sense of what the Englishmen of the thirteenth century were saying.

Our National Motto – "In God We Trust" – succinctly expresses the ethical monotheism woven throughout the other documents. As this Court stated in *Lynch v. Donnelly*, the National Motto is part of the "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." 465 U.S. 668, 674 (1984). The National Motto not only presupposes but also expresses America's devotion to a unitary God who acts according to a divine creative plan, for the benefit of all humankind.

The Kentucky displays include the Star Spangled Banner. The National Motto is derived from the line in the anthem that states, "And this be our motto, 'in God is our trust.'"

Lady Justice symbolizes our fair and unprejudiced system of justice and the ideals that it embodies. These ideals include the notion that men are equal in dignity and thus deserving of equal justice. In our heritage, these notions of human dignity and equality owe very much to our belief in a transcendent Creator God who has made known His will for us, through revelation and by endowing us with reason sufficient to discern important moral truths: persons with reason.

Our precious rights and liberties – political, civil, religious – are rooted in God's law. So states the Preamble to the Kentucky Constitution in terms redolent of Madison's

great *Memorial and Remonstrance*: "We the People of Kentucky [are] grateful to Almighty God for the civil, political and religious liberties we enjoy." KY. CONST. pmbl. Almost every other state constitution recognizes in its Preamble a Supreme Being; only three could be said to lack any approving invocation or reference to God.

III. Precedents From This Court and Lower Federal Courts Establish That the Bible and Biblical Morality Have a Unique Place in Our Culture and in Our Legal Tradition.

The unifying principle of the Kentucky displays is the *Memorial and Remonstrance,* combined with this Court's declaration in *Schempp.* The nine documents manifest, in varying but mutually reinforcing ways, the influence of a "Lawgiver" God upon our thinking and practices concerning human rights and limited government. The historical fact is indisputable: biblical ethical monotheism *is* that influence. No one suggests that Confucius and Muhammad played any meaningful role in our founding period. They did not. But the God who delivered the two tablets to Moses certainly did. And nothing whatsoever in this Court's precedents suggests that the Establishment Clause requires government to pretend otherwise.[14]

This Court said in *Stone v. Graham* – the case most relied upon by the court below and by the Respondents in this Court – that the Bible "may constitutionally be used in an appropriate study of history, civilization, ethics and

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[14] We discuss fully what the Establishment Clause *does* require *infra* Part V.

comparative religion, *or the like*."[15] "Or the like" indicates a potentially great range of secular subjects to which Biblical literacy – knowledge of the history, the various literary forms, and stories in the Bible – is integrally related.

One federal judge took the measure of the influence the Bible has had in our culture. The Bible is "replete" with writings relevant to such secular subjects as "history, both ancient and modern, literature, poetry, music, art, government, social customs and practices, values, [and] behavioral sciences."[16] Another federal court noted how our language and popular culture are replete with Biblical allusions, including the symbol of the American Medical Association (staff with serpent, from the Book of Numbers); the phrase "handwriting on the wall" (from the Book of Daniel); and the phrase "apple of my eye" (one of God's Old Testament descriptions of his people, Israel).[17]

Our laws, our form of government, and our political history are not understandable without reference to the biblical ethical monotheism. "Anglo-American law as we know it today," wrote one federal district court, "is ... heavily indebted to principles and concepts found in the Bible."[18] That "unique contribution" has been so great that one federal judge rested his approval of a public school Bible curriculum on this observation: "To ignore the role of the Bible in the vast area of secular subjects ... is to ignore a keystone in the building of an arch, at least

[15] 449 U.S. 39, 42 (1981) (emphasis added).

[16] Wiley v. Franklin, 468 F. Supp. 133, 149 (E.D. Tenn. 1979).

[17] Gibson v. Lee County Sch. Bd., 1 F. Supp. 2d 1426, 1431 (M.D. Fla. 1998).

[18] *Id.*

insofar as Western history, values and culture are concerned."[19] Another judge defended "the overriding importance of providing our children with a basic education in the Bible."[20] As three members of this Court recently stated: "The text of the Ten Commandments no doubt has played a role in the secular development of our society and can no doubt be presented by the government as playing such a role in our civic order." *City of Elkhart v. Books*, 121 S. Ct. 2209, 2211 (2001) (Rehnquist, C.J., dissenting from denial of certiorari) (quoting *Books v. City of Elkhart*, 235 F.3d 292, 302 (7th Cir. 2000)).

The judicial citations could be multiplied in support of this proposition: cultural and political literacy in America *still* depend upon the Bible in a way, and to an extent, far greater than such literacy depends upon the Koran, the Bhagavad Gita, or any other religion's sacred texts. It is as simple as that.

IV. The Sixth Circuit's Mistakes Entirely Undermine Its Conclusion

The Kentucky displays are a tightly integrated set, each witnessing powerfully to an enduring commitment of the American people, expressed almost as a commonplace at the Founding and for centuries thereafter. This Court has long sanctioned, even championed, the most sublime expression of this commitment, Madison's *Memorial and Remonstrance*.

[19] *Wiley*, 468 F. Supp. at 150.

[20] Crockett v. Sorenson, 468 F. Supp. 1422, 1429 (W.D. Va. 1983).

The Sixth Circuit nonetheless somehow missed the whole point of the displays. The judges below could not see, for example, what the religious duties of believers in the First Table of Commandments had to do with the other documents. Nor did those documents "discuss" the moral norms of the Second Table. *McCreary County*, 354 F.3d at 450. But how can the reasonable observer now fail to see that the Decalogue is the implicit reference point of Madison's powerful *Memorial and Remonstrance*? For on Mount Sinai Moses received essentially this divine communication: "I am the One God and here is My moral law." Here is the Supreme Lawgiver guiding all who are willing to listen; here is the measure of action which calls forth God's blessing. Here we see, as did Madison in his *Memorial and Remonstrance*, biblical ethical monotheism anchoring our cherished liberties.

How did the Sixth Circuit stray so far off the track?

The court made four basic mistakes applying what it believed to be the *Lemon* test. Each mistake is big enough to undermine the court's legal conclusions.

First, the Sixth Circuit offered its legal conclusions – "endorsement" and "religious purpose" – as implications of its "no connection" thesis. We have seen that the thesis is false: the documents are a coherent set with a common theme. They *are* connected. But even if the court's "no-connection" thesis *were* true, its legal conclusions would not follow. Given the overwhelmingly political provenance of the texts displayed, anyone experiencing "disconnect" would conclude one of two things: either he did not fully understand the display, or one of the plaques did not belong with the others. The "reasonable observer" would not agree with the Sixth Circuit that a single puzzling or

anomalous text – the Ten Commandments – makes the whole display "religious," any more than a perplexed Supreme Court visitor who, knowing Confucius *only* in religion, would conclude that the frieze lacks a secular purpose or endorses religion.

Second, the Sixth Circuit saddled Kentucky authorities with an unprecedented burden of proof: they had to "demonstrate" a connection between the Decalogue and the other documents. We have already seen some flaws in the court's idea of a "demonstration." These flaws include the requirement that there be a "facial" connection apparent from the words on paper. We have seen that this Court laid down an entirely different approach in *Schempp*: What do the texts "evidence"? The Sixth Circuit ignored *Schempp,* and suggested that the only corrective was to integrate the Ten Commandments into a curricular offering, a full-blown course. *Id.* at 448. But the suggestion is tantamount to declaring that no passive display is constitutionally permissible. *That* is surely not the law propounded by this Court.

This Court has resisted all such *per se* rules. This Court has never said that a passive display of the Ten Commandments *even standing alone* is *per se* unconstitutional. That was the factual setting of *Stone.* Three members of this Court recently noted the "unique [factual] setting" in *Stone,* where posting the Decalogue *alone* in classrooms "effectively induced schoolchildren to meditate upon the Commandments during the school day." *City of Elkhart*, 121 S. Ct. at 2211 (Rehnquist, C.J., dissenting from denial of certiorari). Here the Ten Commandments are not alone. In the two settings at issue they are not in a schoolhouse at all. This case is scarcely the right setting for a lower federal court to depart from this Court's holdings,

and to create the first *per se* rule ever in this area of the law.

Third, the court below fixated on one claim in the courthouse prefatory description, the claim that the Decalogue provides "the moral background of the Declaration of Independence." *McCreary County*, 354 F.3d at 443. The Sixth Circuit treated it as a litmus test of the Defendants' case. To say that the court here mistook the tree for the forest would be to word the mistake charitably. And the court was wrong in concluding that the illustration fails. It works.

The Sixth Circuit fixated on a question about Jefferson's mind: was he inspired to write the Declaration's phrases about unalienable rights by the Ten Commandments, or at least by the Bible more generally? *Id.* at 452. But the mental sources of Jefferson's *draft* – whatever they were – are irrelevant to the only question that matters: What evidence does the writing itself supply about its sources and inspiration?

The Declaration of Independence was not and was never understood to be an extension of Jefferson's mind. It was signed and thus enacted by fifty-five individuals, meant by these many authors to be effective according to the common convictions of humankind. The Declaration was intended to stir all Americans to resist tyranny. It was published out of "respect to the opinions of mankind." Jefferson's private theological views – whatever they were – have nothing to do with these purposes. His idiosyncratic theology would have *impeded* wide understanding and acceptance of the Declaration. No doubt, either, that Jefferson's theology was unrepresentative. Even the historian relied upon by the Sixth Circuit – Pauline Maier

– reported on Jefferson's "heterodox religious views." *Id.* at 452 n.6.

Fourth, the Sixth Circuit misapprehended the *nature* of the connection it sought. The court did not comprehend that, because the nine texts are members of the one set, their "connection" is more vertical than horizontal. That is, they are related to each other characteristically by virtue of their common possession of a unifying principle, and not necessarily by a complex pattern of cross-fertilization: the Mayflower Compact as one part Decalogue and one part Magna Carta, and so on. The nine are rather like siblings, constituted as such by common parentage, but each one different in important ways from its brothers and sisters.

The Sixth Circuit may have been thrown off track by the fact (ably shown by Appellants' Brief below) that the specific norms in the Decalogue influenced legislation in the colonies and, later, the states. As Chief Justice Warren asserted in Oral Argument of *Murray v. Curlett*, the companion to *Schempp*: "[C]ouldn't we say th[at] ... practically all of our basic crimes ... stem from a violation of the Ten Commandments?"[21] There is certainly much historical evidence that the Decalogue played a role in the origins of the other documents that they obviously did not play in its origins. But this asymmetrical horizontal influence is *incidental* to the real unity ("connection") of the Kentucky sets. All of the documents evidence how a particular worldview – biblical ethical monotheism – shaped our thinking about rights, government, and law.

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[21] Transcript of Oral Argument at 24, Murray v. Curlett, 374 U.S. 203 (1963) (No. 119), *in* ORAL ARGUMENT OF THE SUPREME COURT OF THE UNITED STATES: THE WARREN COURT, 1953 TERM-1968 TERM (1984).

V. This Court's Precedents, Including *Stone v. Graham*, Establish the Test in This Case: The Displays Must Not Purposely Advance a Particular Religion.

The Sixth Circuit correctly stated that it had "neither the ability nor the authority to determine the 'correct' view of American history." *McCreary County*, 354 F.3d at 453. The judges were therefore obliged to accept for purposes of this litigation that biblical ethical monotheism has had a profound influence on our legal tradition, our laws, and the formation of our country. It is so. We have seen how this Court on many occasions has recognized the role of religion and of the Bible (including biblical morality) in our history. The Sixth Circuit quoted some of them. *Id.* at 450–52.

Is there any reason to nonetheless agree with the Sixth Circuit's *judgment* of unconstitutionality? What is the law governing this case? How does this Court's holding in *Stone v. Graham* apply on these facts?

This Court has abandoned many tenets of its holding in *Stone*. For one thing, the "secular purpose" test has shifted. The current statement of this requirement is from *Bowen v. Kendrick*: "Under the *Lemon* standard, which guides '[t]he general nature of our inquiry in this area,' a court may invalidate a statute only if it is motivated wholly by an impermissible purpose." 487 U.S. 589, 602 (1988) (citations omitted). *Lynch v. Donnelly* held that a secular purpose is lacking "only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations." 465 U.S. 668, 680 (1984). In *Wallace v. Jaffree*, this Court said that "the First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to

advance religion." 472 U.S. 38, 56 (1985). The *Wallace* court cited, among other cases, *Stone v. Graham*. *Id.* at 56 n.41.

The Sixth Circuit ignored these developments. It asked whether religion was the "predominant" purpose of the displays. *McCreary County*, 354 F.3d at 446. This errant statement of law may, however, be *dictum*. The court also adopted the district court's conclusion that religion was the "actual" or "primary" purpose of the displays. But then the Sixth Circuit seemed to supersede *these* conclusions. Speaking in its own voice the court concluded that Kentucky's "message" was "patently religious," as was its purpose. *Id.* at 451, 453. Finally, the court said that "Defendants intend to convey the bald assertion that the Ten Commandments formed the foundation of American legal tradition." *Id.* at 454.

Which precisely of these moving targets is supposed to be the real one is impossible to say. In any event, there is no basis whatsoever for saying that the Kentucky displays are motivated "wholly" by religious considerations. So far considered the "secular purpose" test is satisfied.

It is true that this court in *Stone* determined that the Kentucky legislature's purpose in *that* case was wholly religious. The conclusion seems to have been based upon the view that the Decalogue is wholly religious. In an important sense, that is obviously true: what happened on Mount Sinai is believed to be a genuine divine revelation, a religious event if ever there was one. But that sense does not rule out the possibility of considering the Ten Commandments from other perspectives, or from studying them with non-religious purposes in mind. The Decalogue can and often is studied as an example of natural law; as a

turning point in the history of an ancient people with direct modern descendants occupying the same land; as a specialized mode of expression for "religious experience"; and, most pertinently, as a pillar of the ethical monotheism which has shaped *us*.

Stone nonetheless seems to say that the Decalogue is something which, given its completely (or utterly or thoroughly) "religious" character, could *only* be displayed out of a desire to endorse religion. In other words, there could be no secular purpose for displaying the Ten Commandments.

But this is surely untrue, as this Court has since recognized and plainly said. Display of the Decalogue is not *per se* religious, as this Court has confirmed in cases subsequent to *Stone*. Three members of this Court said in 2001: "[W]e have never determined, in *Stone* or elsewhere, that the Commandments lack a secular application." *City of Elkhart*, 121 S. Ct. at 2211 (Rehnquist, C.J., dissenting from denial of certiorari). The Sixth Circuit correctly observed that *Stone* established no *per se* rule "against displaying the Ten Commandments for the purpose of demonstrating a connection with the structure of American law or government." *McCreary County*, 354 F.3d at 448. The *Stone* court itself described the Decalogue *both* as *per se* sectarian, and as at least arguably (or potentially) secular, recognizing the "arguably secular" character of matters "such as honoring one's parents, killing or murder, adultery, stealing, false witness and covetousness." 449 U.S. at 41–42. Since we are all called upon to read, and obey, if not to meditate upon and venerate, the law against murder, it is hard to see how educating schoolchildren to do so could never be a permissible state purpose.

Neither *Stone* nor any other Supreme Court ruling has squarely applied the "endorsement" test to contextual display of the Ten Commandments such as we have here. On a first look, the question – "does it endorse religion to recognize the role of biblical ethical monotheism has played in our law and our life" – seems unanswerable. Or, the answer is: in a sense, yes, and, in a sense, no. The best answer is, however, no, in the *decisive* sense: the point and effect of the Kentucky displays is about secular matters, such as human rights, basic liberties, and constitutional government, not religion.

It is important to consider, too, that to leave the biblical ethical monotheism *out* of any attempt to convey the foundations of our Republic would be *false*. To require such a *false* presentation could reasonably be taken to indicate hostility to religion, even as an intention to disparage it. To require a *false* presentation would be to substitute a nonreligious ideology for the *objective* presentation which the Sixth Circuit correctly said was required by the Constitution. To require a *false* presentation would then be unconstitutional. Establishment Clause neutrality is a two-way street. It prohibits government endorsement of a particular religion. But it prohibits as well endorsement of nonreligion or secularism.

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The problem is that "endorsement" in some limited sense seems to be part and parcel of *any* display, use, or mention of a sacred text or figure, be it the Bible, the Pieta, or the image of Muhammad. There is no constitutional basis for excluding all such efforts; no case has ever suggested nearly so draconian a measure. How, then, should one think of the "endorsement" test in this context? We think that Justice Lewis Powell correctly articulated the rule. He said in his opinion concurring in the invalidation of a

Creation Science curriculum (*Edwards v. Aguillard*): the Establishment Clause "is properly understood to prohibit the use of the Bible and other religious documents in public school education *only when the purpose of the use is to advance a particular religious belief.*" 482 U.S. 578, 608 (1987) (Powell, J., concurring) (emphasis added).

Stone is therefore to be understood to prohibit governmental display of the Ten Commandments (and, presumably, other religious texts or symbols) wherever the purpose is to promote them as demonstrating the *truth* of a particular religion (Christianity or Judaism). And there is no evidence or suggestion in this record that Kentucky is proselytizing its citizens. The displays under review here aim to promote respect for the underpinnings of our republic, not to convert people to a particular religion.

A final note on the question of whether Kentucky has endorsed a *particular* religion: the Ten Commandments appear in these displays as they are found in the Book of Exodus in the King James version of the Bible. The Decalogue appears, of course, also in Deuteronomy, and there are many translations and editions of the Bible besides the King James. Religious bodies sometimes characteristically prefer one translation or edition of the Bible, to the exclusion of others. There are "Protestant" and "Catholic" editions of Sacred Scripture.

One argument against the Kentucky displays might therefore be that *any* such undertaking has to favor one religious group over all others, because the display has to settle upon some *one* biblical translation. One translation there would have to be, but the conclusion does not follow. The relevant substance is conveyed by any translation. The substance is biblical ethical monotheism, not the

literary details of its expression. Once the reasonable observer sees the point of the display to be *that* biblical ethical monotheism shaped our political world, the observer will readily see, too, that nothing about the particular translation is part of the government's purpose. And so there is no endorsement.

There is no evidence in the record that Kentucky authorities selected the King James edition in order to promote a particular religious group or theology. In fact, the displays do not inform the viewer that he or she is reading from the King James Bible, probably in order to avoid supplying any evidence whatsoever of an endorsement. The King James Bible has long been and remains the most commonly used English language translation. From a literary standpoint, it is beyond question an important milestone in English prose, a literary production whose rhythms and phrases have been echoed in countless subsequent works of literature. *See* ADAM NICOLSON, GOD'S SECRETARIES: THE MAKING OF THE KING JAMES BIBLE xi (2003).

CONCLUSION

The judgment of the Sixth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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